BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

RITA JUNE SOWERS Claimant	)	
V.	)	
KINGMAN COMMUNITY HOSPITAL Respondent	)	Docket No. 1,065,624
AND	)	
KANSAS HOSPITAL ASSOC. WCF INC. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the August 4, 2015, Award entered by Administrative Law Judge (ALJ) Gary K. Jones. This case has been placed on the summary docket for disposition without oral argument. James S. Oswalt of Hutchinson, Kansas, appeared for claimant. Carolyn M. McCarthy of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

The ALJ found claimant did not suffer an injury arising out of and in the course of her employment with respondent. The ALJ determined claimant's injury was an aggravation of a preexisting condition.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant argues her work activities for respondent were the prevailing factor in causing her injury and need for medical treatment. Claimant contends she is permanently and totally disabled as a result of her accident on April 29, 2013. Claimant argues she is entitled to temporary total disability (TTD) benefits from April 29, 2013, through May 5, 2014, and permanent total disability benefits thereafter; past medical expenses; unauthorized medical expenses; medical mileage reimbursement; and future medical treatment.

Respondent argues the ALJ's Award should be affirmed. Respondent maintains claimant failed to meet her burden of proving she sustained an injury arising out of and in the course of her employment.

The issues for the Board's review are:

1. Did claimant meet with personal injury by repetitive trauma on April 29, 2013, arising out of and in the course of her employment?

2. Were claimant's work activities the prevailing factor causing claimant's injury and need for medical treatment?

3. Is claimant entitled to TTD benefits from April 29, 2013, through May 5, 2014, the date she was released by a physician?

4. Is claimant entitled to compensation for unpaid medical expenses?

5. Is claimant entitled to unauthorized medical expenses?

6. What is the nature and extent of claimant's disability?

FINDINGS OF FACT

Claimant began employment with respondent on March 17, 1996, as a cook's aide, a position she held for approximately two years. Claimant then transferred to a housekeeping position where she mopped floors, made beds, removed trash, carried heavy laundry bags, put away clean linens, cleaned patient rooms, and stripped and waxed floors. In the course of a work day, claimant would lift hazardous waste containers weighing approximately 40 pounds at least once per shift, and she would also lift approximately 10-15 laundry bags weighing at least 45-50 pounds each per shift. Claimant continued in this position until April 29, 2013, her last day worked at respondent.

When she was a teenager, claimant injured her low back when she tripped and fell out of a stationary school bus onto concrete. This caused claimant to require an adjustment to her low back by Dr. Donley, a chiropractor. Several years passed before she recovered. Claimant stated she continued to have problems with her back following the fall, with pain ranging from her middle to low back. During her deposition, claimant testified, "I've had a lifetime of back problems."[1]

[1] Claimant's Depo. at 19-20.

Claimant also testified at deposition:

> Q. January, 2013 was when you first started having problems with your back?
>
> . . .
>
> A. Yes.
>
> Q. And prior to January of 2013, you never had any problems with your back?
>
> A. I had some, but I really didn't report it.[2]

Claimant previously filed two accident reports in the course of her employment with respondent. In 2002, claimant reported she struck and injured her low back on a sink while at work, and she again reported an injury to her low back and neck while pulling on a bed at work in 2004. As a result of the 2004 injury, Dr. Moots, claimant's personal physician, ordered an x-ray, taken on November 12, 2004, that showed spondylolisthesis at L5-S1 with facet joint arthritis and spurring at multiple levels with associated scoliosis.[3]

Claimant treated with chiropractor Dr. Veach on a regular basis from 2010 through 2012 for issues related to her neck, shoulders, and low back. Claimant explained she stopped treatment for a time when her husband fell ill. Claimant resumed treatment of her back in the fall of 2012 with both Dr. Moots and her physician assistant (PA) at the Donley Clinic. A CT scan of the lumbar spine taken November 15, 2012, was read to reveal Grade 2 spondylolisthesis at L5-S1 with bilateral spondylolytic defects at the lumbosacral junction and advanced multi-level facet joint degenerative arthritis at the lower two lumbar disc levels.

Claimant was referred by Dr. Moots to Dr. Fan, a pain management physician, who provided a series of three injections to claimant's lumbar spine from January to February 2013. Claimant testified she was experiencing pain through her hips and down into her legs in addition to her low back pain when she treated with Dr. Fan. Claimant testified at deposition:

> Q. When did you first start experiencing the pain down your legs and in the hip area?
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> A. I had some pain from the sciatic nerve down my leg back when I went to the chiropractor at different times, but he would seem to get it straightened out, and then it got to the point that it didn't get straightened out. It just wouldn't go away.

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[2] *Id*. at 16.

[3] See P.H. Trans., Resp. Ex. 6 at 128.

> Q. So you had had the pain down your legs and in your hips dating back until sometime in 2010; is that right?
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> . . .
>
> A. Yes. Off and on – not constant but off and on, but it got to where it was constant there.[4]

Claimant clarified her hip and leg pain became constant at the end of 2012 and at the time she treated with Dr. Fan. Claimant told Dr. Fan the injections did not provide relief and did not return.

An MRI was taken of claimant's lumbar spine on March 20, 2013, the results of which were similar to those of the November 2012 CT scan. The impression was Grade 1 spondylolisthesis of L4 on 5 and L5 on S1 and mild effacement of the spinal canal at L3-4 and L5-S1. Dr. Moots referred claimant to Dr. Dickerson, a neurosurgeon.

On April 29, 2013, claimant submitted a note taking her off work to Pamela Galt, a supervisor for housekeeping and laundry at respondent, which took claimant off work until after her evaluation with Dr. Dickerson, scheduled for May 2013. The note was signed by Dr. Moots' PA. Ms. Galt stated she was unaware, even after receiving the note, whether claimant's back problems were work-related. Claimant testified she had complained of her back pain to Ms. Galt since 2005.

Ms. Galt submitted the note to Nancy Stuchy, respondent's Human Resources Officer. Ms. Stuchy met with claimant to complete various paperwork related to claimant's leave of absence. Ms. Stuchy testified she did not ask claimant if the injury was work-related, nor did claimant request to report a work-related injury at that time. Ms. Stuchy explained that although the note mentioned work increased claimant's pain, "I believed that, according to the note, it aggravated a preexisting condition, is what I assumed by that note."[5] Ms. Stuchy stated she was unaware claimant's condition was a workers compensation claim until she received a letter from claimant's counsel dated May 31, 2013.

Claimant began treatment with Dr. Dickerson in May 2013. On June 26, 2013, Dr. Dickerson performed an L5-S1 fusion on claimant's lumbar spine. Claimant treated postoperatively with a back brace and physical therapy. X-rays of claimant's back dated July 29, 2013, revealed claimant's fusion was well aligned.

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[4] Claimant's Depo. at 23-24.

[5] P.H. Trans. at 50.

On October 22, 2013, claimant met with Dr. George Fluter at her counsel's request for evaluation purposes. Claimant complained of constant low back and right lower extremity pain with numbness in both feet. After reviewing claimant's history, medical records, and performing a physical examination, Dr. Fluter assessed claimant with low back/right lower extremity pain; lumbosacral strain/sprain; lumbar discopathy at L5-S1; probable lower extremity radiculitis; status post lumbar spine surgery; probable sacroiliac joint dysfunction; and probable trochanteric bursitis. Dr. Fluter determined "there is a causal/contributory relationship between [claimant's] current condition and repetitive work-related activities."[6] Further, Dr. Fluter opined the prevailing factor for claimant's condition and need for medical treatment is the reported repetitive work-related activities. Dr. Fluter wrote, "No other prevailing factor is readily identifiable."[7]

Dr. Burton, an orthopedic surgeon and professor at the University of Kansas Medical School, examined claimant at respondent's request on January 17, 2014. Claimant presented with back and bilateral leg pain. Dr. Burton reviewed claimant's history, medical records, and performed a physical examination, determining claimant suffered continued back and leg symptoms following her low back surgery. Dr. Burton opined:

> I have reviewed the pertinent records regarding the time of patient's alleged injury. I really do not see where there is any injury that has been documented to have initiated this. Clearly, her spondylolisthesis was pre-existing. Based upon this I do not believe that her work injury is the prevailing factor but that her pre-existing spondylolisthesis and spinal stenosis was the prevailing factor.[8]

Dr. Burton explained that with isthmic spondylolisthesis, the disc will almost always degenerate by the time a person reached his or her mid to late 50s. When asked if spondylolisthesis on its own would cause the radiculopathy or the pain radiating down claimant's legs, Dr. Burton responded:

> It can and frequently will, but it does, when coupled with narrowing of the nerve tunnel, the foramen at L5-S1, that's usually what goes along with the spondylolisthesis, is not only is there the fracture through the bone at the pars, not only is there slippage of L5 on S1, but the nerve tunnel, the foramen at L5-S1, becomes narrowed. That pinches the L5 nerve root, and that cause[s] the pain down the leg.[9]

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[6] Fluter Depo., Ex. 2 at 6.

[7] *Id*.

[8] Burton Depo., Ex. 2 at 2.

[9] Burton Depo. at 22-23.

A preliminary hearing was held before ALJ Clark, and he found claimant's injury compensable in his Order of February 19, 2014. Respondent appealed to the Board, which found claimant's injury did not arise out of and in the course of her employment in its Order of May 12, 2014.[10]

Claimant returned to Dr. Fluter on June 3, 2014. Dr. Fluter reviewed claimant's updated history, medical records, and performed a physical examination. He determined claimant's diagnoses remained the same as when he saw her in October 2013. Dr. Fluter agreed structural changes to the L5-S1 level of claimant's spine were present prior to April 29, 2013, and that she also previously underwent treatment for back pain. He continued:

> However, the presence of structural changes in the lumbar spine, including spondylolisthesis, are not, in and of themselves, sufficient to warrant surgical intervention. If that were the case, then surgery should have been done as soon as a diagnosis of spondylolisthesis was made.[11]

Dr. Fluter noted claimant had worked with chronic back issues for years until her symptoms progressed, over a period of four months, to the point where she could not work secondary to pain. Dr. Fluter acknowledged claimant's congenital issues, including spondylolisthesis, spondylolysis, stenosis, and facet arthropathy, "which is basically kind of arthritic changes of the facet joints in the spine."[12]

Dr. Fluter opined claimant's repetitive work-related activities were the prevailing factor in her need for medical treatment and her resulting impairment and disability. He testified:

> The change in quality and severity in [claimant's] pain either occurred spontaneously or some mechanism brought about the changes. While it is possible that the changes occurred spontaneously, more likely some other factor brought about the change.[13]

Dr. Fluter stated the 2013 MRI reportedly revealed a mild effacement of claimant's spinal canal at L5-S1 which was not noted in the 2012 CT scan report, which suggests some degree of structural change between the two studies. Dr. Burton testified an MRI will reveal this condition better than a CT scan. Further, Dr. Burton noted the disc bulges were recorded as minimal and at levels where claimant did not have surgery.

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[10] See *Sowers v. Kingman Community Hospital*, No. 1,065,624, 2014 WL 2616666 (Kan. WCAB May 12, 2014).

[11] Fluter Depo., Ex. 3 at 7.

[12] Fluter Depo. at 24.

[13] *Id.* at 43.

Dr. Fluter recommended the following restrictions:

1. Restrict lifting, carrying, pushing and pulling to 20 lbs. occasionally and 10 lbs. frequently (light level of physical demand).
2. Restrict bending, stooping, crouching, and twisting to an occasional basis.
3. Avoid prolonged sitting, standing and walking. Allowance should be made to alternate activities and change position periodically for comfort. In general, sitting, standing, and walking should be limited to approximately 20 minutes every hour, or to tolerance.[14]

Using the AMA *Guides*,[15] Dr. Fluter determined claimant sustained an overall 24 percent impairment to the body as a whole. He explained, of the total, 20 percent is attributed to loss of motion segment integrity of the lumbar spine, placing claimant in DRE Category IV. Dr. Fluter attributed another two percent impairment for sacroiliac joint dysfunction and a seven percent impairment for clinical findings of trochanteric bursitis with abnormal gait. Dr. Fluter recommended claimant receive conservative treatment.

Neurosurgeon Dr. Paul Stein examined claimant on September 18, 2014, for purposes of a court-ordered independent medical examination. Dr. Stein reviewed claimant's history, medical records, and performed a physical examination. In his report, he quoted claimant saying she had only one or two chiropractic treatments prior to his examination. Dr. Stein also noted in his report that claimant had no prior history of work injuries. Regarding causation, Dr. Stein wrote:

> [Claimant] had a preexisting spondylolysis and spondylolisthesis at L5-S1, probably since early childhood. There had been no records presented to show significant symptomatology prior to her employment at [respondent]. The work activity at the hospital has been a substantial aggravation of the preexisting pathology. However, it is my medical opinion that the work activity over time and the aggravation therefrom is the primary and prevailing factor in the current symptomatology and the need for treatment, including the surgery. Many patients with spondylolisthesis go a lifetime without significant pain or requirement for treatment. The "new law" of 5/15/11 indicates that aggravation of a preexisting factor is not compensable. It also says, separately, that injury is compensable if it represents the primary or prevailing factor in the need for treatment. In this particular case, the two areas are contradictory. Which takes precedence, is a legal question and not a medical question.[16]

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[14] *Id*., Ex. 3 at 8.

[15] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[16] Stein IME (Sept. 18, 2014) at 6.

Regardless of causation, Dr. Stein determined claimant sustained a 20 percent impairment to the body as a whole using the AMA *Guides*. He attributed the impairment to loss of motion segment integrity from the fusion to claimant's spine. Dr. Stein recommended claimant receive conservative treatment and imposed the following restrictions:

> 1. No lifting more than 30 pounds up to twice per day, 20 pounds very occasionally and no repetitive lifting. 2. No lifting from below knuckle height or above chest height. 3. No repetitive bending and twisting of the lower back. 4. Have the opportunity to alternate sitting, standing, or walking at least on a 30-minute basis if needed.[17]

Claimant worked part-time performing housekeeping duties at United Methodist Church while she worked for respondent. She had worked at the church since at least 1990 for up to two hours per week, until she stopped in 2011. She indicated the housekeeping duties at the church were very light compared to those performed at respondent. Claimant completed the 11th grade before receiving her GED in 1979. Claimant completed nurse aide training in 1980.

Vocational consultant Paul Hardin interviewed claimant on November 20, 2014, at claimant's counsel's request. In addition to the information received from claimant, Mr. Hardin reviewed the medical reports of Drs. Fluter and Stein. Claimant indicated she was 60 years old at the time of the interview and was not working. Claimant worked at respondent and United Methodist Church in the five years preceding the date of accident. She had no transferrable skills and had worked in unskilled, manual labor positions. Mr. Hardin concluded that based on claimant's age, education, training, prior experience, and the restrictions imposed by Drs. Fluter and Stein, claimant was permanently incapable of engaging in any type of substantial gainful employment. He further noted claimant had been receiving Social Security Disability benefits since October 2013.

During cross-examination, Mr. Hardin testified claimant could work as a greeter for Wal-Mart. However, he indicated this position is usually part-time and would not qualify as substantial, gainful employment.

Mr. Hardin generated a list of 20 unduplicated tasks claimant performed in the five-year period preceding the date of accident. Dr. Fluter reviewed the task list generated by Mr. Hardin. Of the 20 unduplicated tasks on the list, Dr. Fluter opined claimant was unable to perform 19, for a 95 percent task loss.

Claimant interviewed with Steve Benjamin, vocational rehabilitation consultant, on January 26, 2015, at respondent's request. Mr. Benjamin reviewed claimant's work history,

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[17] *Id*. at 6-7.

education, transferrable skills, and the reports from Drs. Fluter and Stein. Mr. Benjamin performed a labor market review for claimant's area, which includes the Wichita Metropolitan Statistical Area. He determined claimant could earn an average wage of $336.53 per week based on the restrictions of Dr. Stein. Under the restrictions imposed by Dr. Fluter, Mr. Benjamin opined claimant would be unable to reenter the open labor market and would be unemployable. Mr. Benjamin also determined claimant performed a total of 20 unduplicated tasks in the five years prior to April 29, 2013. No physician reviewed Mr. Benjamin's task list.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-501b(c) states:

> The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-508(h) states:

> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2012 Supp. 44-508(f) states, in part:

> (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
>
> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
>
> (A) An injury by repetitive trauma shall be deemed to arise out of employment only if:
>
> > (i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

> (ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and
>
> (iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

K.S.A. 2012 Supp. 44-508(g) states:

> "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

ANALYSIS

An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic. The word "solely" is not defined in the Kansas Workers Compensation Act. "Solely" has been defined by the Court of Appeals as "singly" or "[e]xclusively."[18] Stated simply, if all an injury does is aggravate, accelerate or exacerbate a preexisting condition, the claim is not compensable.

The Court of Appeals has held that under K.S.A. 2012 Supp. 44-508(f)(2), if an accidental injury results in a new physical finding, or a change in the physical structure of the body, the claim is compensable, despite claimant also having aggravated a preexisting condition, so long as claimant also proves other compensability requirements, such as prevailing factor under K.S.A. 44-508(f)(2)(B)(ii).[19] There must be a demonstrated physical injury above and beyond a sole aggravation of a preexisting condition.[20] An increase in symptoms without a new diagnosis is not proof of a change in the physical structure of the body.[21]

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[18] *Poull v. Affinitas Kansas, Inc.*, No. 102,700, 228 P.3d 441 (Kansas Court of Appeals unpublished decision dated Apr. 8, 2010).

[19] See *Nam Le v. Armour Eckrich Meats,* __Kan. App. 2d__, 364 P.3d 571 (2015).

[20] See *Nelson v. Wal Mart,* No. 1,061,944, 2013 WL 1384404 (Kan. WCAB Mar. 18, 2013); *Homan v. U.S.D. #259,* No. 1,058,385, 2012 WL 2061780 (Kan. WCAB May 23, 2012); *MacIntosh v. Goodyear Tire & Rubber Co.,* No. 1,057,563, 2012 WL 369786 (Kan. WCAB Jan. 31, 2012); *Short v. Interstate Brands Corp.*, No. 1,058,446, 2012 WL 3279502 (Kan. WCAB July 13, 2012); *Folks v. State of Kansas*, No. 1,059,490, 2012 WL 4040471 (Kan. WCAB Aug. 30, 2012); *Ragan v. Shawnee County,* No. 1,059,278, 2012 WL 2061787 (Kan. WCAB May 30, 2012); *Gilpin v. Lanier Trucking Co.*, No. 1,059,754, 2012 WL 6101121 (Kan. WCAB Nov. 19, 2012).

[21] See *Krueger v. Kwik Shop, Inc.* No. 1,062,995, 2015 WL 996896 (Kan. WCAB Feb. 27, 2015).

Dr. Fluter found claimant's work to be the prevailing factor of her injury and need for medical treatment, stating no other prevailing factor is readily identifiable. Dr. Fluter opined there were changes between the CT scan of November 15, 2012, and the MRI of March 20, 2013. In his examination reports, Dr. Fluter does not refer to the 2004 x-ray. He does report claimant had undergone frequent chiropractic treatments from 2010 through 2012.

Dr. Stein also opined claimant's work activities were the prevailing factor for her injury and need for medical treatment. Dr. Stein's history of claimant's preexisting problems is inaccurate. In his report, he quoted claimant saying she had only one or two chiropractic treatments prior to his examination. Claimant was treated by Dr. Veach, a chiropractor, 28 times from May 10, 2010, to June 20, 2012.[22] Dr. Stein also noted in his report that claimant had no prior history of work injuries. Claimant reported low back injuries while working for respondent on November 20, 2002, and November 12, 2004.[23]

Dr. Stein identified a change in claimant's symptoms related to her spondylolisthesis and spondylosis, but not a change in claimant's physical structure. Dr. Stein's opinions regarding prevailing factor cannot be given much weight in this instance, as it is apparent he did not have an accurate understanding of claimant's prior injuries or the extent of claimant's chiropractic treatment and did not identify any change in claimant's physical structure related to her work activities.

As did the ALJ, the Board gives more weight to the opinions of Dr. Burton. Dr. Burton is a Professor of Orthopedic Surgery at the University of Kansas, specializing in treating spinal disorders. Based upon Dr. Burton's examination of claimant and review of the medical records, he concluded the prevailing factor giving rise to claimant's low back condition and need for medical treatment was her preexisting spondylolisthesis.

CONCLUSION

Claimant failed to prove she suffered an accident arising out of her employment with respondent and that her work activities were the prevailing factor causing her low back condition and need for medical treatment, including surgery. The prevailing factor for claimant's need for medical treatment was her preexisting spondylolisthesis.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Gary K. Jones dated August 4, 2015, is affirmed.

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[22] P.H. Trans., Resp. Ex. 5 at 2-3.

[23] P.H. Trans., Resp. Exs. 2 & 3.

IT IS SO ORDERED.

Dated this _____ day of February, 2016.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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Hon. Gary K. Jones, Administrative Law Judge